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No. _____

In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1991

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Estate of William F. McAllister, Deceased;
Sharon McAllister; Sean McAllister; and
Lori McAllister, Individually, Petitioners

v.

United States of America, Respondent

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

Petitioners seek review of the judgment of the United States Court of Appeals for the Ninth Circuit entered in the appeal of the Estate of William F. McAllister, Deceased; Sharon McAllister; Sean McAllister; and Lori McAllister, individually, Petitioners, v. United States of America, No. 90-35184. The issue before the Court of Appeals was the applicability of the intra-military immunity doctrine of Feres v. United States, 340 US 135 (1950), to bar claims brought against the government and its military personnel for conduct causing the death of LTC William F. McAllister, Deceased.

Questions presented to the Court of Appeals and presented here are:

1. Does the Feres Doctrine (Feres v. United States, 340 US 135 (1950), deprive the court of jurisdiction where the deceased's death resulted from acts "not incident to service"?

2. Do the facts, as pled in the Complaint, require the court to become involved in sensitive military affairs at the expense of military discipline and effectiveness?

## LIST OF PARTIES

The names of all parties in this case are contained in the caption of this Petition.

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Petitioners

v.

United States of America, Respondent

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Ninth Circuit entered in the above entitled case on August 28, 1991.

**OPINIONS BELOW**

The opinion of the Court of Appeals of the Ninth Circuit delivered upon the rendering of its judgment in this case is reported at Estate of William F. McAllister, Deceased, et al v. United States of America, 942 F2d 1473 (9th Cir. 1991) and is set forth in Appendix A to this Petition.

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**JURISDICTION**

The judgment of the Court of Appeals of the Ninth Circuit was entered on August 28, 1991. Jurisdiction of this Court is invoked pursuant to 28 U.S.C., Subsection 1254(1).

## STATUTES INVOLVED

28 U.S.C., Subsection 1346(b)

> Subject to the provisions of chapter 171 of this title (28 USCS, Subsection 2671 et seq.), the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States for money damages, accruing on and after January 1, 1945, for injury or loss to property, or personal injury or death caused by the negligence or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, as a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

## STATEMENT OF THE CASE

Petitioners' action arose from

the stabbing death of LTC William F. McAllister on December 31, 1986. LTC McAllister, an active duty member of the United States Army, was standing near the Post Exchange at the Presidio, San Francisco, California, when he was murdered by one Private (PVT) Leon Tarver, also a member of the United States Army.

Petitioners seek to recover money damages pursuant to the Federal Tort Claims Act, 28 U.S.C. Subsection 1346(b), for the death of LTC William McAllister. Petitioners allege in their Complaint that "Private Tarver was a member of the U.S. Army attached or assigned to Letterman Army Hospital...under the care and supervision...at Letterman Army Hospital" for evaluation and treatment and "was diagnosed as having mental and/or

personality disorders." Petitioners further allege that the Department of the Army was negligent in "failing to properly supervise, control and treat said Private Tarver and in failing to otherwise protect the decedent, William F. McAllister, from Private Leon Tarver when defendant...knew or should have known that said Private Tarver posed a foreseeable risk of harm to the public."

Petitioners are the estate of the deceased and the deceased's heirs-at-law, Sharon McAllister, spouse, and Sean and Lori McAllister, son and daughter, respectively. This action was instituted by way of a Complaint in the United States District Court for the District of Oregon against the United States contending that the United States and/or its agents were

negligent in carelessly, wrongfully and negligently failing to properly supervise, control and treat said Private Tarver and in failing to otherwise protect the decedent, William F. McAllister, from said Private Leon Tarver when Defendant, its employees and agents knew or should have known that said Private Tarver posed a foreseeable risk of harm to the public.

Private Tarver stabbed LTC McAllister with a 14" survival knife which entered the deceased in his stomach region, severing the aorta, puncturing a number of vital organs, and striking the deceased's backbone. At the time of his death LTC McAllister was off duty and not under compulsion of orders. He was in the process of departing the military installation for personal business to

assist a friend in completing a year-end inventory at a civilian hardware store when his death occurred. The death occurred on New Year's Eve and LTC McAllister was not required to return to duty for several days. LTC McAllister, at the time of his demise, was not performing military duties, was on personal business, and was in the process of departing post. LTC McAllister was not, at the time of his death, partaking of any benefit related to his military status. The occurrence took place near the Post Exchange (PX) in an area open to the public. Presidio of San Francisco was an "open post" which, at the time, gave free access to civilians or military personnel without requirement of uniform or identification. The area where the murder occurred is accessible by

civilians without the necessity of military status.

At no time in the moments prior to his death was LTC McAllister engaged in military business, nor did he have any military requirements or duties to perform in the hours and days subsequent.

Defendant moved for dismissal contending that "at all relevant times decedent was on active duty" and the Court, therefore, lacked subject matter jurisdiction, citing Feres v. United States, 340 US 135 (1950) and Stauber v. Cline, 837 F2d 395 (9th Cir. 1988).

The Defendant United States' Motion to Dismiss contended that the action was barred as a matter of law because of the Feres Doctrine. The matter was heard upon Motion by the Magistrate

for the United States District Court for the District of Oregon. The Magistrate's Findings and Recommendations concluded that the matter was barred as a matter of law, finding that the Defendant's conduct "with respect to Private Tarver did require the exercise of professional judgment as to the composition and control of military force that is not appropriate for civilian judicial review." The Magistrate also stated in his Findings and Recommendations that "although the apparent decision that Private Tarver's medical condition did not necessitate his restraint or confinement may have been a medical decision, given Tarver's history of mental disorders the decision to allow him to remain in the Army at all can only be characterized as a military personnel

decision."

**District Court Jurisdiction**

Jurisdiction of the District Court was invoked in McAllister et al v. United States of America, 942 F2d 1473 (9th Cir. 1991), pursuant to 28 U.S.C., Subsection 1346(b) as involving a claim against the United States under the provisions of the Federal Tort Claims Act. The Complaint alleged that the direct and proximate cause of the death of the decedent was the negligence of the defendant, the Department of the Army and it agents and employees, in carelessly, wrongfully and negligently failing to properly supervise, control and treat said Private Tarver and in failing to otherwise protect the decedent, William F. McAllister, from said Private Tarver when

defendant, its employees and agents, knew or should have known that said Private Tarver posed a foreseeable risk of harm to the public. It was further alleged that the supervision, control and treatment of said Private Leon Tarver did not require defendant's employees and agents to exercise complex, subtle and professional judgment as to composition, training, equipping and controlling of the military force.

**The Rulings Below**

Relying on the intramilitary immunity doctrine of Feres v. United States, 340 US 135 (1950), the District Court granted the Motion to Dismiss filed by the Respondent herein. Petitioners thereafter invoked the jurisdiction of the Court of Appeals pursuant to 28 U.S.C.,

Subsection 1291.

The Court of Appeals affirmed the Judgment of the District Court.

Petitioners seek review of the Judgment of the Court of Appeals.

**The Facts Presented**

In its opinion, the Court of Appeals summarized the facts surrounding the death of LTC McAllister as follows:

> On New Year's Eve five years ago, Private Leon Tarver attacked, stabbed, and killed Lieutenant Colonel William McAllister near the Post Exchange ("PX") on the premises of the Presidio in San Francisco, California. "It is undisputed that [Lieutenant Colonel] McAllister was off duty and not under [the] compulsion of [military] orders at the time of his death. He was not performing any military duties, was on personal business, and [was] in the process of leaving the base." Estate of McAllister v. United States, No. 89-6150 at 3 (D. Or. Dec. 6, 1989)

(magistrate's findings and recommendation), adopted by No. 89-6150 (D. Or. Dec. 28, 1989)(order of dismissal).

At the time of the killing, Private Tarver, on the other hand, was under the government's care and supervision as a patient of the Letterman Army Hospital on the Presidio grounds. Tarver, who had been diagnosed while serving in Germany as a paranoid schizophrenic with potentially dangerous tendencies, had been assigned to the Letterman Hospital for treatment and evaluation in March 1986. Three months later, the Army reassigned Tarver to active duty in South Korea, but he was again diagnosed as schizophrenic and potentially dangerous and was transferred back to the Letterman Hospital in October 1986, where he remained through the date of the murder.

Charging the Army with medical malpractice in its supervision of Private Tarver, the estate and heirs of Lt. Col. McAllister filed suit under the Federal Tort Claims Act ("FTCA") on April 25, 1989. The government subsequently filed a motion to

> dismiss for lack of subject matter jurisdiction pursuant to the Feres doctrine, and the district court granted that motion upon the recommendation of a federal magistrate on December 28, 1989. The estate and heirs then filed this timely appeal. (Appendix A, at App 4).

**The Findings of The Court of Appeals**

The Court of Appeals analyzed the case before the court as "strikingly analogous to the facts in Shearer" (Appendix A, at App 10; McAllister, et al v. United States, supra).

The Court of Appeals also apparently found intriguing the "instructive comparison" between the language in Mrs. Shearer's Complaint and the language in Petitioners' Complaint. (Appendix A, at App 11; McAllister, et al v. United States, supra).

The Court of Appeals further compared the present case to the facts in Persons v. United States 925 F2d 292 (9th Cir. 1991), stating that in Persons, the estate and heirs of a naval officer brought suit against the government alleging medical malpractice on the part of the physicians and staff of a military hospital. The decedent (Persons) had presented himself to the hospital's emergency room with "seven deep slash marks on each of his wrists [that] bore witness to his deepest distressed emotional state and attested to his attempted suicide." 925 F.2d at 294. Apparently, "[a]fter a few hours, and without being admitted to the hospital for observation, he was released. Some three months later, on December 23, 1987, Kelly

Persons committed suicide." Id. The claimants contended in Persons that the hospital's doctors had been negligent in failing to provide Persons with adequate counseling or treatment. Admitting its reluctance but acknowledging its obligation, this court affirmed dismissal of the claims pursuant to Feres. Id at 299. (Appendix A, at App 12; McAllister, et al v. United States, supra).

The Court of Appeals determined in the case before the Court that the relevant relationship between the servicemember's activity and the military service was lacking. In denying Petitioners' relief on appeal, the Court of Appeals stated, "There is no meaningful difference between the facts in Persons where a serviceman's mental disorder and

the alleged negligence of the military hospital in treating it resulted in the death of that serviceman by suicide, and the facts in the case before us, where a serviceman's mental disorder and the alleged negligence of the military hospital in treating it resulted in the death of another serviceman at the hands of the first." (Appendix A, at App 12; McAllister, et al v. United States, supra).

The Court of Appeals did not make a finding of any relevant relationship between LTC McAllister's activities at the time of his death and his military service, but nonetheless concluded that the Feres doctrine is applicable.

**REASONS FOR GRANTING THE WRIT**

The holding of the Court of Appeals is, in effect, a holding that the Feres doctrine applies if there exists some connection between the wrongdoer's (in this case Private Tarver) conduct and the wrongdoer's military status, even though the injured serviceman's activity was not service connected. This is contrary to the holding of Shearer v. United States, 723 F.2d 1102 (3rd Cir. 1983).

The "tort-feasor status activity" of the Feres doctrine, rejected in Shearer v. United States, supra, 723 F.2d at 1106, appears to have been adopted in the opinion delivered in the present case. A split of authority, therefore, exists over whose "activity" is considered

relevant in applying the "incident to service" test announced by the court in Feres. Under that test, immunity from liability exists for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." Feres v. United States, supra, 340 US at 146.

The Court of Appeals, focused upon Private Tarver's condition as a serviceman with a mental disorder and the alleged negligence of a military hospital and treating that disorder, resulting in the death of another servicemember. This is compared as similar by the Court of Appeals to Persons where a serviceman's mental disorder and the alleged negligent treatment by a military hospital resulted in that serviceman's death. (Appendix A,

at App 12; McAllister, et al v. United States, supra). The facts of Persons and McAllister are at odds and result in contradictory decisions.

The Court of Appeals notes a distinction between the cases but apparently chose to ignore the distinction:

> "Appellants, however, argue otherwise. They purport to distinguish Persons on the basis of the fact that in Persons the decedent serviceman was himself the alleged victim of medical malpractice, whereas here the decedent serviceman was the victim of a failure to control a second, mentally disturbed serviceman. Because McAllister was not the army hospital patient himself, they point out, the nexus between the victim and the various benefits and obligations 'incident to military service' is more strained in this case." (Appendix A, at App 12, McAllister, et al v. United States, supra).

The Court of Appeals states that the argument has "intuitive appeal" but unfortunately for Appellants "this factual distinction cannot overcome the breadth of Feres rule as it has been applied in prior decisions. In Millang, for example, this court held that the Feres doctrine barred an action by an officer who was run over by a military police vehicle while off duty and attending a picnic. The court found that the action arose out of activity "incident to service" because Millang's presence at and use of the picnic area hinged on his military status and because the tortious driver was an officer acting subject to military command." (Appendix A, at App 13; McAllister, et al v. United States, supra).

Petitioners submit that the Ninth Circuit application of the Feres doctrine to the facts alleged is incorrect. The allegations of Petitioners' Complaint are sufficient to establish that the injured serviceman's death was not incident to service. Applying the rule promulgated in the case before the Court by the Ninth Circuit would preclude any person having a military status from bringing suit if injured by another military servicemember regardless of whether the injury was "incident to service" or not. The predicatory authority of this court has not established such a rule.

In focusing on the conduct of the wrongdoer (Private Tarver), the Court of Appeals disregarded the allegations of

the Complaint relative to the deceased victim (LTC McAllister). The allegations were sufficient to find the death was not incident to service. In doing so the Court of Appeals' ruling is inconsistent with Shearer v. United States, 723 F2d 1102 (3rd Cir. 1983); Millang v. United States, 817 F2d 532 (9th Cir. 1987); Persons v. United States, 925 F2d 292 (9th Cir. 1991). In each of the above referenced cases there was a connection between the wrongdoer and the victim or the victim's conduct, of a military nature substantially greater than any connection between LTC McAllister and Private Tarver. In Shearer, supra, the victim and wrongdoer knew each other and the genesis of the confrontation occurred while both were in a duty status.

In Persons, supra, the servicemember was receiving medical care at a military hospital, a benefit due only by right of Persons' military status. In Millang, supra, the injured servicemember was utilizing a picnic area on the military reservation and participating in a military sponsored function.

The only "relationship" between the deceased and his murderer in the case before the court was that both happened to be members of the United States Army. The allegations of the Complaint state that LTC McAllister was "on personal business and not in the direct performance of this duties." (Complaint paragraph 5, page 2).

The logic of the holding by the Court of Appeals would require the any person in a military status be barred from

bringing suit against the United States for the acts of another in a similar military status with no consideration given to the victim's activities. That is not the rule of Feres, supra.

For these reasons, the ruling of the Court of Appeals is inconsistent with the rule of law established by this honorable court.

## CONCLUSION

WHEREFORE, Petitioners respectfully pray that writ of certiorari be granted to resolve the conflict which exists in the decisions of the federal courts of appeals over the proper

interpretation of the Feres doctrine.

Respectfully submitted,

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APPENDIX A

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ESTATE OF WILLIAM F. MCALLISTER, Deceased; SHARON MCALLISTER; SEAN MCALLISTER; and LORI MCALLISTER, individually,
*Plaintiffs-Appellants,*

v.

UNITED STATES OF AMERICA,
*Defendant-Appellee.*

No. 90-35184

D.C. No. CV-89-6150-RE

OPINION

Appeal from the United States District Court
for the District of Oregon
James A. Redden, Chief District Judge, Presiding

Argued and Submitted
March 12, 1991—San Francisco, California

Filed August 28, 1991

Before: Alfred T. Goodwin, David R. Thompson and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

## SUMMARY

### Governmental Torts/Jurisdiction

Affirming a district court judgment dismissing a wrongful-death action, the court of appeals held that the *Feres* doctrine precluded the Federal Tort Claims Act (FTCA or Act) action

against the government for the killing of a military service person by another in the service previously diagnosed with mental disorders.

Appellant estate and heirs of William McAllister challenged a district court's dismissal of their wrongful-death action against the government under the Federal Tort Claims Act (FTCA). Private McAllister was off duty and not under the compulsion of military orders at the time he was stabbed and killed by another serviceman on duty. The assailant had been diagnosed twice by the military as schizophrenic and potentially dangerous and was assigned to a military hospital. Charging the Army with medical malpractice in the supervision of the attacker, the estate and heirs of McAllister filed suit under the FTCA. The district court granted the government's motion to dismiss for lack of subject matter jurisdiction.

[1] The court noted that as a specific exception to the FTCA's general waiver of sovereign immunity, the Act provides that the government shall not be liable for any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war. However, the Supreme Court has extended this military exception to the Act's waiver of immunity to injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. [2] However, precisely how a court should apply the *Feres* doctrine to the facts of a given case, remains unclear. [3] When presented with conflicting messages from the Supreme Court, lower courts have typically resorted to comparing fact patterns in previous cases with that in the case before them in an effort to produce the most appropriate outcome. Although intellectually unsatisfying, a comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine compelled the conclusion that the rule barred appellants' motion in this case.

[4] The present facts were substantially similar to the facts in *Persons*, where the Ninth Circuit very recently found a

*Feres*-based bar to suit. [5] There was no meaningful difference between the facts in *Persons*, where a serviceman's mental disorder and the alleged negligence of a military hospital in treating it resulted in the death of that serviceman by suicide, and the facts in the case before us, where a serviceman's mental disorder and the alleged negligence of a military hospital in treating it resulted in the death of another serviceman at the hands of the first. [6] Unfortunately for appellants, the factual distinction that, here, McAllister had been killed by another serviceman could not overcome the breadth of the *Feres* rule as it has been applied in prior decisions.

[7] Regardless of the merits of the *Feres* doctrine or the persuasiveness of its rationales, there is no doubt that it provides a broad blanket of immunity to protect the government against allegations of negligence in military contexts. Therefore, the court reluctantly affirmed.

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## COUNSEL

L.E. Ashcroft, Rhoten, Speerstra, Rinehart & Ashcroft, Salem, Oregon, for the plaintiffs-appellants.

Steven Bransdorfer, United States Department of Justice, Washington, D.C., for the defendant-appellee.

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## OPINION

O'SCANNLAIN, Circuit Judge:

The estate and heirs of William McAllister appeal from the district court's dismissal of their wrongful-death action under the *Feres* doctrine. *See Feres v. United States*, 340 U.S. 135 (1950). We must affirm.

I

On New Year's Eve five years ago, Private Leon Tarver attacked, stabbed, and killed Lieutenant Colonel William McAllister near the Post Exchange ("PX") on the premises of the Presidio in San Francisco, California.[1] "It is undisputed that [Lieutenant Colonel] McAllister was off duty and not under [the] compulsion of [military] orders at the time of his death. He was not performing any military duties, was on personal business, and [was] in the process of leaving the base." *Estate of McAllister v. United States*, No. 89-6150 at 3 (D. Or. Dec. 6, 1989) (magistrate's findings and recommendation), *adopted by* No. 89-6150 (D. Or. Dec. 28, 1989) (order of dismissal).

At the time of the killing, Private Tarver, on the other hand, was under the government's care and supervision as a patient of the Letterman Army Hospital on the Presidio grounds. Tarver, who had been diagnosed while serving in Germany as a paranoid schizophrenic with potentially dangerous tendencies, had been assigned to the Letterman Hospital for treatment and evaluation in March 1986. Three months later, the Army reassigned Tarver to active duty in South Korea, but he was again diagnosed as schizophrenic and potentially dangerous and was transferred back to the Letterman Hospital in October 1986, where he remained through the date of the murder.

Charging the Army with medical malpractice in its supervision of Private Tarver, the estate and heirs of Lt. Col. McAllister filed suit under the Federal Tort Claims Act ("FTCA") on April 25, 1989. The government subsequently filed a motion to dismiss for lack of subject matter jurisdiction pur-

[1] "Because this case involves an appeal from an order dismissing for want of jurisdiction, we accept as true the factual allegations contained in appellants' complaint. *Broudy v. United States*, 661 F.2d 125, 126 n.1 (9th Cir. 1981)." *Persons v. United States*, 925 F.2d 292, 294 n.1 (9th Cir. 1991).

suant to the *Feres* doctrine, and the district court granted that motion upon the recommendation of a federal magistrate on December 28, 1989. The estate and heirs then filed this timely appeal.

II

The presence or absence of subject matter jurisdiction under the FTCA, 28 U.S.C. §§ 1346(b), 2671-80, is a question of law reviewable de novo. *See Atkinson v. United States*, 825 F.2d 202, 204 (9th Cir. 1987), *cert. denied*, 485 U.S. 987 (1988). In the process of reviewing that question, the court must "review independently the question whether the *Feres* doctrine is applicable to the facts reflected in the record." *McGowan v. Scoggins*, 890 F.2d 128, 129 (9th Cir. 1989); *see also Persons v. United States*, 925 F.2d 292, 294 (9th Cir. 1991) (quoting same).

III

A

[1] The FTCA provides in relevant part that:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . . .

28 U.S.C. § 2674 (1988). As a specific exception to this general waiver of sovereign immunity, the Act provides that the government shall not be liable for "[a]ny claim arising out of the *combatant* activities of the military or naval forces, or the Coast Guard, *during time of war*." *Id.* § 2680(j) (emphasis added). Notwithstanding the explicit terms of this latter provision, the Supreme Court has determined that the military exception to the Act's waiver of immunity is considerably broader than this provision suggests. Upholding decisions to

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dismiss an action by the heirs of a soldier who had perished by fire in the barracks of an Army camp "while on active duty in service of the United States," the Court unanimously held in 1950 that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity *incident to service*." *Feres*, 340 U.S. at 137, 146 (emphasis added).

The Court reached the same conclusion in two other cases that were consolidated and decided along with *Feres*: *Jefferson v. United States* and *United States v. Griggs*. Like the present case, both of these cases involved allegations of medical malpractice by Army doctors. In *Jefferson*, a soldier who had received an abdominal operation in an Army hospital brought suit on his own behalf when, "eight months later, in the course of another operation after [he had been] discharged, a towel 30 inches long by 18 inches wide, marked 'Medical Department U.S. Army' was discovered and removed from his stomach." *Id.* at 137. In *Griggs*, the executrix of a soldier's estate alleged that "while on active duty [the soldier had] met death because of negligent and unskillful medical treatment by army surgeons." *Id.* In the Court's view, "[t]he common fact underlying the three cases [was] that each claimant, while on active duty and not on furlough, [had] sustained injury due to negligence of others in the armed forces." *Id.* at 138. Under such circumstances and in light of the fact that Congress created separate statutory schemes to compensate for the deaths and injuries of armed services personnel, the Court concluded that there could be no government liability under the FTCA. *See id.* at 144.

The *Feres* doctrine, as the rule of these three cases has come to be known, is highly controversial. It has been criticized "by countless courts and commentators," including this Court. *Persons*, 925 F.2d at 295. Some have found fault with the Court's creation of a judicial exception to a clear statutory pronouncement and the unfairness that the rule has often produced. *See, e.g., United States v. Johnson*, 481 U.S. 681, 700

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(1987) (Scalia, J., dissenting and joined by Brennan, Marshall, and Stevens, JJ.) ("*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received.") (citation omitted); *id.* at 703 (urging Court to "limit our clearly wrong decision in *Feres* and confine the unfairness and irrationality that decision has bred"); *Atkinson*, 825 F.2d at 206; *id.* at 206-07 (Noonan, J., concurring); *Atkinson*, 804 F.2d 561 (9th Cir. 1986), *withdrawn by*, 825 F.2d 202. Others have found fault with the essential vagueness and ambiguity of the doctrine itself. *See, e.g., Millang v. United States*, 817 F.2d 533, 535 (9th Cir. 1987) (per curiam) (noting the "somewhat elusive 'incident to service' standard"), *cert. denied*, 485 U.S. 987 (1988); *Monaco v. United States*, 661 F.2d 129, 132 (9th Cir. 1981) (noting that "the basis for the exception has recently become the subject of some confusion"), *cert. denied*, 456 U.S. 989 (1982); *Persons*, 925 F.2d at 295 (citing *Millang* and *Monaco* and noting that "it is entirely unclear which of the doctrine's original justifications survive"). A comparison of reasoning with outcomes in cases that have applied the doctrine validates these concerns: the results have not flowed easily from the doctrine's purported rationales.

Nonetheless, the *Feres* doctrine remains the law of the land, and we must undertake to apply it.

B

In the *Feres* case itself, the Supreme Court enunciated two rationales for the "intramilitary immunity" exception to the FTCA's waiver. Twenty-seven years later, the Court enunciated a third. *See Stencel Aero Eng'g Corp. v. United States*, 431 U.S. 666, 671-72 (1977). As we recently explained in *Persons*, these three rationales are:

> "(1) the distinctively federal nature of the relationship between the government and members of its armed forces, which argues against subjecting the

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> government to liability based on the fortuity of the situs of the injury; (2) the availability of alternative compensation systems [for military personnel and their families]; and(3) the fear of damaging the military disciplinary structure."

925 F.2d at 294-95 (quoting *Atkinson*, 825 F.2d at 204).

In *United States v. Shearer*, 473 U.S. 52 (1985), however, the Supreme Court stated that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules," thereby eviscerating any hope that a simple application of these three rationales to the facts at hand might produce the proper result. *Id.* at 57. The *Shearer* Court explained that:

> Although the Court in *Feres* based its decision on several grounds, "[i]n the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty.' "

*Id.* (quoting *United States v. Muniz*, 374 U.S. 150, 162 (1963) (quoting *United States v. Brown*, 348 U.S. 110, 112 (1954))). The *Shearer* Court went on to explain that the first two rationales — the only two mentioned in the *Feres* opinion itself — were "no longer controlling," leaving only the military-discipline rationale as a reason for invoking the *Feres* bar. *Id.* at 58 n.4; *see also Persons*, 925 F.2d at 295 (citing *Shearer* and noting same).

[2] Only two years later, however, the Supreme Court appeared to reverse course in *United States v. Johnson*, 481 U.S. 681 (1987), reasserting the relevance and validity of all three purported rationales over the vociferous dissent of four

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Justices who were inclined to abandon the doctrine altogether. *See id.* at 684 n.2, 688-691. Precisely how a court should apply the *Feres* doctrine to the facts of a given case, therefore, remains unclear. A reconciliation of prior pronouncements on the subject is not possible.[2]

IV

[3] When presented with conflicting messages from the Supreme Court, lower courts have typically resorted to comparing fact patterns in previous cases with that in the case before them in an effort to produce the most appropriate outcome. Although intellectually unsatisfying, a comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine compels the conclusion that the rule bars the appellants' action here.

A

As an initial matter, we must consider the decisions in *Jefferson* and *Griggs*, the two companion cases that accompanied *Feres*. There, the Supreme Court held that the *Feres* rationales barred claims of medical malpractice when the treatment complained of was provided by military surgeons. *Feres*, 340 U.S. at 137, 146. Because appellants seek to escape operation of the *Feres* doctrine by characterizing their claim as a medical malpractice claim, reference to *Jefferson* and *Griggs* alone suffices to repudiate that distinction.

Appellants purport to differentiate *Jefferson*, *Griggs*, and *Feres* by relying upon *Brooks v. United States*, 337 U.S. 49 (1949), which the Supreme Court decided one year earlier. There, the Court held that "members of the United States armed forces can recover under th[e Federal Tort Claims] Act for injuries *not* incident to their service." *Id.* at 50 (emphasis

[2]For an exhaustive analysis of the "evolution" of this troubled doctrine, see *McGowan v. Scoggins*, 890 F.2d 128, 129-36 (9th Cir. 1989).

a lded). In *Brooks*, two brothers who were members of the a med services were struck by a military-owned vehicle d iven by a civilian employee of the Army while they were o it on furlough and driving along a public highway. The Court held that the subsequent tort suit could proceed. When the Court decided *Jefferson*, *Griggs*, and *Feres* one year later, it did not overrule *Brooks*; rather, as appellants point out, the Court distinguished the earlier case:

> The injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under compulsion of no orders or duty and on no military mission. A government owned and operated vehicle collided with him. Brooks' father, riding in the same car, recovered for his injuries and the Government did not further contest the judgment but contended that there could be no liability to the sons, solely because they were in the Army. This Court rejected the contention, primarily because Brooks' relationship while on leave was not analogous to that of a soldier injured while performing his duties under orders.

*F res*, 340 U.S. at 146. Arguing that McAllister was similarly of duty and under the compulsion of no military orders at the ti ie of his death, appellants contend that their case is more lil e *Brooks* than it is like *Jefferson* or *Griggs*.

If the evolution of the *Feres* doctrine had stopped in 1950, appellants would have the better argument. Subsequent cases, however, have expanded greatly the factual circumstances under which the conduct of military personnel will be deemed "incident to service." As the government correctly points out, the facts in this case are strikingly analogous to the facts in *Shearer*, where the Supreme Court also found a *Feres*-based ba to suit. When he was off duty and away from his base, United States Army Private Vernon Shearer was kidnapped and murdered by another serviceman, Private Andrew Heard.

Shearer's mother, as administratrix of his estate, brought suit against the United States under the FTCA. She alleged that the Army's negligence had caused her son's death. Prior to the murder, Heard had served in Germany, where he had been convicted of manslaughter by a German court and sentenced to a four-year prison term. After Heard served his term, the Army transferred him to Fort Bliss, where he eventually killed Private Shearer. In her suit, Mrs. Shearer alleged that the Army had been fully aware of Heard's dangerous nature and had been negligent in failing to control him and in failing to warn others about him. *Shearer*, 473 U.S. at 53-54. The Supreme Court, however, ordered dismissal of the suit, holding that allowing the action to proceed would infringe impermissibly upon the military's command and disciplinary decisions with respect to its personnel. *Id.* at 58-59.[3]

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[3]In its brief, the government has set forth an instructive comparison between the language in Mrs. Shearer's complaint and the language in appellants' complaint. The critical passages are nearly identical:

> Respondent's complaint strikes at the core of [the *Feres*] concerns. In particular, respondent alleges that Private Shearer's superiors in the Army "negligently and carelessly failed to exert a reasonably sufficient control over Andrew Heard, . . . failed to warn other persons that he was at large, [and] negligently and carelessly failed to . . . remove Andrew Heard from active military duty." This allegation goes directly to the "management" of the military; it calls into question basic choices about the discipline, supervision, and control of a serviceman.

*Shearer*, 473 U.S. at 58 (footnotes and citation omitted).

> The direct and proximate cause of the death of the decedent was the negligence of the defendant, the Department of the Army and its agents and employees[,] in carelessly, wrongfully and negligently failing to properly supervise, control and treat said Private Tarver and in failing to otherwise protect the decedent, William F. McAllister, from said Private Leon Tarver when defendant, it's [sic] employees and agents knew or should have known that Private Tarver posed a foreseeable risk of harm to the public. The supervision, control and treatment of said Private Leon Tarver did not require defendants, employees, and agents to exercise complex, subtle, and professional judgment as to composition, training[,] equipping and controlling of a military force.

*Estate of McAllister v. United States*, Complaint at ¶ 10.

[4] The present facts are also substantially similar to the facts in *Persons*, where this court very recently found a *Feres*-based bar to suit. In *Persons*, the estate and heirs of a naval officer brought suit against the government alleging medical malpractice on the part of the physicians and staff of a military hospital. The decedent had presented himself to the hospital's emergency room with "seven deep slash marks on each of his wrists [that] bore witness to his deeply distressed emotional state and attested to his attempted suicide." 925 F.2d at 294. Apparently, "[a]fter a few hours, and without being admitted to the hospital for observation, he was released. Some three months later, on December 23, 1987, Kelly Persons committed suicide." *Id.* The claimants contended that the hospital's doctors had been negligent in failing to provide Persons with adequate counseling or treatment. Admitting its reluctance but acknowledging its obligation, this court affirmed dismissal of the claims pursuant to *Feres*. *Id.* at 299.[4]

[5] We must do the same. There is no meaningful difference between the facts in *Persons*, where a serviceman's mental disorder and the alleged negligence of a military hospital in treating it resulted in the death of that serviceman by suicide, and the facts in the case before us, where a serviceman's mental disorder and the alleged negligence of a military hospital in treating it resulted in the death of *another* serviceman at the hands of the first.

Appellants, however, argue otherwise. They purport to distinguish *Persons* on the basis of the fact that in *Persons* the decedent serviceman was *himself* the alleged victim of medical malpractice, whereas here the decedent serviceman was

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[4] The court in *Persons* affirmed dismissal of the medical malpractice claims only to the extent that those claims related to the treatment of the decedent. The court reversed and reinstated a claim that the government had been negligent in failing to provide psychological counseling to the decedent's *family* in the aftermath of his suicide. The court held that *Feres* did not bar this latter claim. *See* 925 F.2d at 297-99. Appellants have not alleged such a claim in their complaint here.

the victim of a failure to control a *second*, mentally disturbed serviceman. Because McAllister was not the army hospital patient himself, they point out, the nexus between the victim and the various benefits and obligations "incident to military service" is more strained in this case.

[6] This argument has intuitive appeal, and if the legal slate were clean, it might carry the day. Unfortunately for appellants, however, this factual distinction cannot overcome the breadth of the *Feres* rule as it has been applied in prior decisions. In *Millang*, for example, this court held that the *Feres* doctrine barred an action by an officer who was run over by a military police vehicle while off duty and attending a picnic. The court found that the accident arose out of activity incident to service because Millang's presence at and use of the picnic area hinged on his military status and because the *tortious driver* was an officer acting subject to military command. 817 F.2d at 534-35. Similarly, in *Bon v. United States*, 802 F.2d 1092 (9th Cir. 1986), this court held that *Feres* barred a claim by a servicewoman who, while paddling a canoe rented from a naval facility, was struck and injured by a motor boat operated by another service member. The court found the motor boat operator's status as a member of the military "subject to discipline" relevant to its decision. *Id.* at 1095. Given *Millang* and *Bon*, the difference between *Persons* and the present appeal cannot alter the outcome.

B

Even putting *Shearer* and *Persons* aside, virtually every other significant precedent suggests that the *Feres* doctrine bars appellants' suit. For example, in *Atkinson*, this court held that a servicewoman could not pursue a claim for allegedly negligent prenatal care received at a military hospital while she was on active-duty status. The court explained that even though the lawsuit did not implicate concerns of military discipline or encroach upon " 'complex, subtle, and professional decisions as to the composition, training, equipping, and con-

trol of a military force,' " the broad reach of the *Feres* doctrine nonetheless precluded the action. *Atkinson*, 825 F.2d at 205 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). Similarly, in *Veillette v. United States*, 615 F.2d 505 (9th Cir. 1980), this court held that the parents of an Air Force serviceman who had been treated at a naval hospital after an off-duty motorcycle accident could not sue the government for the alleged negligence of the hospital's doctors and employees. In the court's view, it was immaterial that Veillette had been off duty at the time of the accident; that he had been a member of the Air Force and not a member of the Navy; and that the treating naval hospital attended to both civilian and military personnel. As the court explained, "allegations of medical malpractice, the basis of two of the claims rejected in *Feres*, have consistently been held to fall within the bounds of the doctrine when the plaintiff was a serviceman on active duty at the time of the alleged malpractice." 615 F.2d at 507 (citing numerous cases); *see also Persons*, 925 F.2d at 296 ("In this Circuit, *Atkinson* . . . and *Veillette* . . . are controlling.").

C

[7] Regardless of the merits of the *Feres* doctrine or the persuasiveness of its rationales, there is no doubt that it provides a broad blanket of immunity to protect the government against allegations of negligence in military contexts:

> For all the complexity of the evolution of the doctrine, . . . what is *not* unclear and escapes all current confusion is its overall trend. From *Brooks*, 337 U.S. 49, the first Supreme Court case addressing an FTCA suit brought by a service person, to *United States v. Johnson*, *supra*, jurisprudence has been guided by an increasing sense of awe for things military. As a result, practically any suit that "implicates the military judgments and decisions," *id.* at 691, runs the risk of colliding with *Feres*.

*Id.* at 295 (emphasis in original). As the Sixth Circuit has observed:

> Review of the[ ] Supreme Court precedents makes it clear that in recent years the Court has embarked on a course dedicated to broadening the *Feres* doctrine to encompass, at a minimum, *all* injuries suffered by military personnel that are even remotely related to the individual's *status* as a member of the military, without regard to the location of the event, the status (military or civilian) of the tortfeasor, or any nexus between the injury-producing event and the essential defense/combat purpose of the military activity from which it arose.

*Major v. United States*, 835 F.2d 641, 644-45 (6th Cir. 1987) (emphasis in original), *cert. denied*, 487 U.S. 1218 (1988); *see Johnson*, 481 U.S. 681 (1987) (*Feres* doctrine barred heirs of Coast Guard pilot from maintaining wrongful death action based on negligence of civilian air traffic controllers); *United States v. Stanley*, 483 U.S. 669 (1987) (logic of *Feres* barred Army officer who was secretly administered doses of LSD from maintaining a *Bivens* action against the Army); *Chappell v. Wallace*, 462 U.S. 296 (1983) (logic of *Feres* bars enlisted military personnel from maintaining *Bivens* actions against their superior officers). Indeed, appellants have not been able to cite a single Supreme Court case in support of their position since *Brooks*, and we are aware of no such case.

## V

In light of the foregoing, we must affirm. In so doing, we follow a long tradition of reluctantly acknowledging the enormous breadth of a troubled doctrine. *See, e.g., Persons*, 925 F.2d at 299 ("Seemingly manacled by precedent, this Circuit has repeatedly expressed its strong reservations [about the *Feres* doctrine] before ultimately overcoming them.") (citing *Atkinson*, 825 F.2d at 206 (grudgingly reversing a prior deci-

sion in light of *Johnson*), *Monaco*, 661 F.2d at 134 (confessing that "[t]he result in this case disturbs us. . . If developed doctrine did not bind us we might be inclined to make an exception. . . Unfortunately, we are bound"), and *Veillette*, 61[illegible] F.2d at 506 ("Reluctantly, we affirm")).

AFFIRMED.

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No. 91-867

# In the Supreme Court of the United States

OCTOBER TERM, 1991

ESTATE OF WILLIAM F. MCALLISTER, DECEASED, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether *Feres* v. *United States*, 340 U.S. 135 (1950), bars petitioners' action under the Federal Tort Claims Act to recover for the death of a member of the military that occurred on an Army base at the hands of a fellow serviceman.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 942 F.2d 1473. The opinion of the district court is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 28, 1991. The petition for a writ of certiorari was filed on November 26, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. On the evening of December 31, 1986, Lieutenant Colonel William F. McAllister, an active-duty member of the U.S. Army, was stabbed and killed by Private Leon Tarver, also a member of the Army. Pet. 4. The stabbing occurred on the Army base at the Presidio in San Francisco, California, as Colonel McAllister was leaving the base on personal business. Pet. App. 4.

At the time of the stabbing, Private Tarver was under the care and supervision of U.S. Army officials as a patient of the Letterman Army Hospital on the Presidio grounds. Tarver had first been assigned to the hospital for treatment in March 1986, after he was diagnosed as a "paranoid schizophrenic with potentially dangerous tendencies." Pet. App. 4. He was released to active duty in June 1986, but he was transferred back to the Letterman Army Hospital in October 1986, after again being diagnosed as schizophrenic and potentially dangerous. *Ibid.*

2. Colonel McAllister's estate and members of his family brought this wrongful death action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.* The complaint alleged that the Army and its agents "carelessly, wrongfully and negligently fail[ed] to properly supervise, control and treat said Private Tarver" and "fail[ed] to otherwise protect [McAllister] from [Tarver]," even though the Army "knew or should have known that Private Tarver posed a foreseeable risk of harm to the public." Pet. App. 11 n.3 (quoting Compl. ¶ 10).

3. The United States District Court for the District of Oregon dismissed the complaint for lack of

subject matter jurisdiction. See Pet. App. 2. The court relied on *Feres* v. *United States*, 340 U.S. 135, 146 (1950), which bars FTCA claims "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."

4. The court of appeals affirmed, Pet. App. 1-16, finding that the facts of this case were "strikingly analogous" (*id.* at 10) to those of *United States* v. *Shearer*, 473 U.S. 52 (1985), where this Court applied the *Feres* doctrine to bar an FTCA suit brought by the estate of a serviceman who had been killed by another serviceman, allegedly as a result of negligent government supervision. Pet. App. 10.

## ARGUMENT

The court of appeals correctly concluded that this case is controlled by *United States* v. *Shearer*, 473 U.S. 52 (1985). Petitioners' arguments to the contrary are unpersuasive.

In *Shearer*, this Court held that the *Feres* doctrine barred an FTCA suit against the government brought by the estate of a serviceman who had been kidnappd and murdered by another serviceman. The complaint in *Shearer* alleged that the Army "negligently and carelessly failed to exert a reasonably sufficient control over" the serviceman who committed the murder, even though the Army "knew [he] was dangerous." 473 U.S. at 54. The court of appeals in *Shearer* held that *Feres* was inapplicable because at the time of the murder the victim was off duty, away from the Army base, and not engaged in military activity. 473 U.S. at 54. This Court rejected that approach. The Court in *Shearer* explained that "the situs of the murder is not nearly as important as whether the suit requires the civilian court to second-guess military decisions, and whether the suit might impair

essential military discipline." *Id.* at 57 (citation omitted). The Court concluded that the allegations in the complaint "str[uc]k[] at the core of these concerns." *Id.* at 58. The allegations went "directly to the 'management' of the military," calling into question "basic choices about the discipline, supervision, and control of a serviceman." *Ibid.*

As the court of appeals recognized, the same conclusion is compelled in this case. The material allegations in petitioners' complaint are virtually identical to those of the complaint in *Shearer*. Here, as in *Shearer*, the complaint alleged that the Army was negligent in its supervision of a serviceman, and that the Army's negligent supervision led to the death of another serviceman. Here, as in *Shearer*, a court reviewing those allegations would have to inquire into decisions by the military about the discipline, supervision and control of its members. See *Shearer*, 473 U.S. at 57-58. The *Feres* doctrine is designed to avoid such an inquiry. See *Dozler* v. *United States*, 869 F.2d 1165 (8th Cir. 1989) (*Feres* bars FTCA claim against military for allegedly failing to warn servicemember about violent tendencies of another servicemember ).

Petitioners contend that the court of appeals erred by focusing on "Private Tarver's condition as a serviceman with a mental disorder and the alleged negligence of a military hospital [in] treating that disorder." Pet. 19. They argue that the court should have focused instead on "the allegations of the Complaint relative to [McAllister]." Pet. 22-23.

The court of appeals was correct, however, to focus on the allegations in petitioners' complaint that claimed tortious conduct by the government. Those allegations, like the virtually identical allegations in

*Shearer*, call into question "basic choices about the discipline, supervision, and control of a serviceman," *Shearer*, 473 U.S. at 58.

Petitioners similarly ignore the analysis in *Shearer* when they argue that there was less of a "connection between the wrongdoer and the victim * * * of a military nature" in this case than there was in *Shearer*. Pet. 23. Petitioners base that argument on the assertion that "[i]n *Shearer* * * * the victim and wrongdoer knew each other and the genesis of the confrontation occurred while both were in a duty status." *Ibid.* Those facts, even if true, clearly were not relevant to the Court's analysis in *Shearer*, however, because they are not even mentioned in the Court's opinion.

Quite apart from *Shearer*, it is clear that petitioners' action is barred because the injury alleged was incident to service. See *United States* v. *Johnson*, 481 U.S. 681, 686-688 (1987); see also *United States* v. *Stanley*, 483 U.S. 669, 681-684 (1987). Lieutenant McAllister's death occurred on an Army base. Controlling what happens on military bases is an integral part of the military mission, as many courts have rightly held in applying *Feres* to bar FTCA suits seeking recovery for injuries sustained on military bases. See, *e.g.*, *Morey* v. *United States*, 903 F.2d 880 (1st Cir. 1990); *Millang* v. *United States*, 817 F.2d 533 (9th Cir. 1987); *Major* v. *United States*, 835 F.2d 641 (6th Cir. 1987), cert. denied, 487 U.S. 1218 (1988). The court of appeals was therefore correct in holding that the injury alleged in petitioners' complaint was "incident to service" and accordingly barred by *Feres*.

Contrary to petitioners' contention (Pet. 19-20), the court of appeals did not base its holding on a misreading of the Ninth Circuit's prior decision in *Per-*

*sons* v. *United States*, 925 F.2d 292 (1991). In *Persons*, the Ninth Circuit held that *Feres* barred a suit against the government brought by the estate of a serviceman who committed suicide, allegedly as a result of negligent psychiatric treatment at a military hospital. *Id.* at 294, 299. In the present case, the court of appeals recognized that "in *Persons* the decedent serviceman was *himself* the alleged victim of medical malpractice, whereas here the decedent serviceman was the victim of a failure to control a *second*, mentally disturbed serviceman"; the court determined, however, that this distinction did not save petitioners' complaint from the *Feres* bar. Pet. App. 12-13. That determination was clearly correct, since in *Shearer* the Court held that the *Feres* doctrine barred a suit in which the decedent serviceman was the victim of the military's alleged failure to control a second serviceman. The factual distinction between *Persons* and the present case serves only to bring the present case squarely within the holding of *Shearer*.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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